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No.

SUPREME COURT, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,
Respondent,

vs.

ROY ANTONE NICHOLS,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether the admission of prior bad act evidence in violation of Rules 404(b) and 608(b), Federal Rules of Evidence, requires, under a proper standard for Appellate Review, reversal of a criminal conviction.

TABLE OF CONTENTS

QUESTION PRESENTED I
TABLE OF CONTENTS II
TABLE OF AUTHORITIES II
OPINIONS BELOW 1
STATEMENT OF JURISDICTION 1
STATUTES INVOLVED 2
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE WRIT 4

I. The Decision Below Conflicts With the Decisions of Other Courts of Appeals 4
II. The Decision Below Conflicts With Applicable Decisions of This Court 6
III. The Decision Below Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court 8

CONCLUSION 9
APPENDIX A1

TABLE OF AUTHORITIES

Cases:

Anderson v. Smith, 751 F.2d 96 (2d Cir. 1984) 7, 8
Enriquez v. Procunier, 752 F.2d 111 (5th Cir. 1984) 6
Foster v. Watkins, 423 F.Supp. 53 (WDNC 1976) 6
Lataille v. Ponte, 754 F.2d 33 (1st Cir. 1985) 5
People v. Bracamonte, 119 CA App. 3rd 644, 274 Cal. Rptr. 191 (1981) 6
Spencer v. Texas, 385 U.S. 554 (1967) 6
United States v. Beechum, 582 F.2d 898 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979) 5

United States v. Bosley, 615 F.2d 1274 (9th Cir. 1980) 6
United States ex rel. Bleinehl v. Canon, 525 F.2d 414 (7th Cir. 1975) 5
United States v. DiMatteo, 716 F.2d 1361 (11th Cir. 1983), *cert. granted*, 105 S.Ct. 769, *aff'd*, 759 F.2d 831, *cert. denied*, 106 S.Ct. 172 (1985) 6
United States v. Dunn, 805 F.2d 1275 (6th Cir. 1986) 5
United States v. Hastings, 461 U.S. 499 (1983) 8
United States v. Karr, 544 F.2d 195 (5th Cir. 1976) 6
United States v. Ling, 581 F.2d 1118 (4th Cir. 1978) 6
United States v. Schwartz, 790 F.2d 1059 (3d Cir. 1986) 5
United States v. Shackleford, 738 F.2d 776 (7th Cir. 1984) 6

Statutory Provisions:

Fed.Evid. Rule 404(b), 28 U.S.C. 2, 3, 5, 8
Fed.Evid. Rule 608(b), 28 U.S.C. 2, 6

Miscellaneous:

Bray, "Evidence of Prior Uncharged Offenses and the Growth of Constitutional Restrictions," 28 U. Miami L.Rev. 489 (1974) 7
Kuhns, "The Propensity to Misunderstand the Character of Specific Acts Evidence," 66 Iowa L.Rev. 777 (1981) 8
Teitelbaum, Sutton-Barbere & Johnson, "Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries," 1983 Wis.L.Rev. 1147 (1983) 8
2 Weinstein & Berger, *Weinstein's Evidence*, Section 404 [08] 8

No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,
Respondent,

vs.

ROY ANTONE NICHOLS,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit (No. 86-1556WM), whose judgment is herein sought to be reviewed, was decided and filed on January 6, 1987. This opinion is reported in 808 F.2d 660 (8th Cir. 1987), and is set forth in the Appendix at A1 through A8.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on January 6, 1987, affirming Defendant's conviction of distribution of cocaine in violation of 21 U.S.C. Section 841 (a)(1). Petitioner timely filed a Motion for Rehearing by Panel or, in the Alternative, for Rehearing En Banc

which was denied by the Court of Appeals on February 25, 1987.

This Petition is filed within sixty (60) days of that denial. This Court has jurisdiction pursuant to 28 U.S.C. Sections 1254(1) and 2101(c). The District Court had jurisdiction over this cause pursuant to 18 U.S.C. Section 3231.

STATUTES INVOLVED

Fed.Evid. Rule 404(b), 28 U.S.C.

(b) Other crimes, wrongs, or acts

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Fed.Evid. Rule 608(b), 28 U.S.C.

(b) Specific instances of conduct

Specific instances of conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

STATEMENT OF THE CASE

On December 2, 1985, an indictment was returned against Roy Antone Nichols charging him with distribution of cocaine in violation of Title 21, United States Code, Section 841(a)(1). Nichols pled not guilty to the indictment, and his case was tried before a jury. At the trial of this cause, the government was allowed to cross-examine Nichols with regard to several prior bad acts that allegedly occurred in 1981. At the time of trial, these acts were over four years old. The Defendant denied these allegations of prior drug dealings, however, rather than being bound by the answer of the Defendant, the prosecution was allowed to produce collateral proof through the testimony of one Jerry Mosby. Mosby provided extrinsic evidence contrary to the denials of the Defendant. The testimony of Mosby was not offered in the government's case in chief but was offered as rebuttal testimony.

On March 12, 1986, the jury returned a verdict of guilty against Nichols, and thereafter, counsel filed a timely new trial motion which was overruled by the court. On April 25, 1986, the Defendant was sentenced to eight years in the custody of the Attorney General and counsel then thereafter filed a timely notice of appeal on the 2nd day of May, 1986. The primary issue raised in Nichols' appeal to the Eighth Circuit was that the District Court erred in permitting the government to rebut his testimony with extrinsic evidence of his participation in drug sales in 1981. Nichols argued that the Federal Rules of Evidence 608(b) explicitly bars such extrinsic evidence and, further, that the testimony was inadmissible under the Federal Rules of Evidence 404(b). The Eighth Circuit Court of Appeals held that the government failed to establish the admissibility of Mosby's testimony under Rule 404(b).

However, the Court stated that the government's case against Nichols was overwhelming and any error concerning the admission of Mosby's testimony was harmless beyond a reasonable doubt. (A6)

On January 20, 1987, Nichols filed a Petition for Rehearing by Panel, or in the Alternative, for Rehearing En Banc which the Eighth Circuit denied on February 25, 1987. (A9) Nichols then filed a Motion for Stay of Mandate pending certiorari proceedings to this Court which was granted on March 6, 1987.* (A10)

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the decisions both of other Courts of Appeals and of this Court regarding the proper standard to determine whether to reverse a conviction when prior bad act testimony is erroneously introduced. In the alternative, the decision below decided an important question of federal law which has not been, but should be, settled by this Court.

I. The Decision Below Conflicts With the Decisions of Other Courts of Appeals.

A. Rule 404(b), Federal Rules of Evidence.

The Eighth Circuit Court of Appeals in its opinion decided that the admission of prior bad act evidence was harmless beyond a reasonable doubt because the evidence against Nichols was overwhelming and, therefore, affirmed

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*The Motion for Stay of Mandate was based upon Appellant's assertion that the Court would grant certiorari due to the conflict in the circuits on this issue and upon conflict with this Court's decision on this issue.

Nichols' conviction. Other courts which have considered this issue have adopted different standards for reversal when prior bad act testimony is erroneously introduced. In *United States v. Dunn*, 805 F.2d 1275 (6th Cir. 1986), the government introduced prior criminal acts of the defendant in its rebuttal. The court held that the government's evidence was improper under 404(b) and the prejudicial impact of this evidence outweighed its probative value. Therefore, the court held that the conviction must be set aside. *Id.* at 1283. The Seventh Circuit Court of Appeals has held that the erroneous admission of the prior bad act testimony normally constitutes prejudicial error supporting the grant of a new trial. *United States ex rel. Bleinehl v. Canon*, 525 F.2d 414 (7th Cir. 1975).* The First Circuit Court of Appeals in *Lataille v. Ponte*, 754 F.2d 33 (1st Cir. 1985) has stated that the standard for reversal when bad act testimony is erroneously introduced is whether one can say "with fair assurance . . . that the judgment was not substantially swayed by the error. . . ." *Id.* at 37. The Third Circuit Court of Appeals in *United States v. Schwartz*, 790 F.2d 1059 (3d Cir. 1986) held that the admission of prior bad act testimony in the government's rebuttal was not harmless because the court could not say that the evidence "did not contribute to the jury's judgment of conviction." *Id.* at 1062. Similarly, the Fifth Circuit Court of Appeals has held when the extrinsic act evidence is similar to the charged offense it aggravates the risk of unfair prejudice. *United States v. Beechum*, 582 F.2d 898, 915, n.20 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979). If a proper standard for reversible error is followed in this case, the conviction should be reversed.

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*But see, *United States v. Shackleford*, 738 F.2d 776 (7th Cir. 1984), discussed *infra*.

B. Rule 608(b), Federal Rules of Evidence.

The opinion by the Eighth Circuit Court of Appeals is also in conflict with other circuits which have ruled that it is reversible error to allow extrinsic evidence to prove misconduct not resulting in a conviction in violation of Federal Rules of Evidence 608(b). *See United States v. Karr,* 544 F.2d 195 (5th Cir. 1976); *United States v. Bosley,* 615 F.2d 1274 (9th Cir. 1980); *United States v. Ling,* 581 F.2d 1118 (4th Cir. 1978); *United States v. DiMatteo,* 716 F.2d 1361 (11th Cir. 1983), *cert. granted,* 105 S.Ct. 769, *aff'd,* 759 F.2d 831, *cert. denied,* 106 S.Ct. 172 (1985). Congress in approving the Federal Rules of Evidence and the Supreme Court in enforcing them intended Rule 608(b) to be a rule covering discretionary cross-examination in which the interrogator would be bound by the answer given. Such rule is not intended to allow the government to introduce remote evidence of misconduct under the fiction of proper rebuttal. Therefore, the Federal Rules of Evidence were misused by the method in which this evidence was introduced and reversible error occurred.

II. The Decision Below Conflicts With Applicable Decisions of This Court.

This Court has implied that, in a particlular case, the admission of uncharged misconduct evidence might involve a situation where the jury decided the case on an improper basis, thus, giving rise to a fifth or fourteenth amendment due process violation. *Spencer v. Texas,* 385 U.S. 554 (1967); see also *Foster v. Watkins,* 423 F.Supp. 53 (WDNC 1976); *Enriquez v. Procunier,* 752 F.2d 111, 115 (5th Cir. 1984); *Cf., People v. Bracamonte,* 119 CA App. 3rd 644, 274 Cal. Rptr. 191 (1981); and *United States v. Shackleford,* 738 F.2d 776 (7th Cir. 1984) (Court held at p. 783, that "except in unusual circumstances, emanations from evi-

dence of a defendant's bad acts are almost always suggestive of a defendant's propensity to commit other bad or criminal acts and tend to impugn his or her credibility, and errors in admitting such evidence consequently often go to the fundamental fairness of the trial;" Court did however use the standard of whether there was other "overwhelming" evidence in deciding if there was harmless error; Court did reverse the conviction). *See generally, Bray,* "Evidence of Prior Uncharged Offenses and the Growth of Constitutional Restrictions," 28 U. Miami L.Rev. 489 (1974). When a constitutional violation has occurred, the proper test in determining whether the error was harmless was not whether, as this panel held, the evidence was overwhelming, but rather whether there is a recognizable possibility that the improperly admitted evidence contributed to the verdict. As the court stated in *Anderson v. Smith,* 751 F.2d 96, 105-106 (2d Cir. 1984):

> But the sufficiency of the evidence is irrelevant to our determination whether admission of the videotape was harmless constitutional error under *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and progeny, a subject that we have explored in some depth not too long ago in *Kampshoff v. Smith,* 698 F.2d 581 (2d Cir. 1983). The question is not whether there is legally "sufficient evidence (of guilt) on which the accused could have been convicted without the evidence complained of." *Fahy v. Connecticut,* 375 U.S. 85, 86, 84 S.Ct. 229, 230, 11 L.Ed.2d 171 (1963). Indeed, even if a court considers the evidence overwhelming, it should not automatically assume that a constitutional error is harmless. *See Harrington v. California,* 395 U.S. 250, 254, 89 S.Ct. 1726, 1728, 23 L.Ed.2d 284 (1969); *Chapman,* 386 U.S. at 23, 87 S.Ct. at 827. The test rather is simply whether "there is

> a reasonable possibility that the improperly admitted evidence contributed to the conviction." *Schneble v. Florida*, 405 U.S. 427, 432, 92 S.Ct. 1056, 1059, 31 L.Ed. 2d 340 (1972); *accord Chapman*, 386 U.S. at 24, 87 S.Ct. at 828.

It should be noted that *Anderson* was decided subsequent to the case cited by the panel - *United States v. Hastings*, 461 U.S. 499 (1983). When the correct standard for deciding whether harmless error has occurred in cases involving constitutional error is applied, Appellant's conviction must be reversed.

III. The Decision Below Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

The question raised by this Petition, if not yet decided by this Court, should be. It is an important question of federal law which impacts substantially upon the administration of criminal justice in this country. For instance, Federal Rule of Evidence 404(b) has, according to Chief Judge Weinstein, generated more decisions than any other single rule. 2 Weinstein and Berger, *Weinstein's Evidence*, Section 404 [08]. Additionally, the prejudicial effect of admission of this type of evidence has been the subject of several law review articles. See *Kuhns*, "The Propensity to Misunderstand the Character of Specific Acts Evidence," 66 Iowa L.Rev. 777 (1981); *Teitelbaum, Sutton-Barbere & Johnson*, "Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries," 1983 Wis.L.Rev. 1147 (1983). Courts throughout this country obviously require this Court's guidance on this question.

CONCLUSION

For the reasons stated, the Petition should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1556

United States of America,
Appellee,
vs.
Roy Antone Nichols,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri.

Submitted: November 14, 1986
Filed: January 6, 1987

Before HEANEY, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and BOWMAN, Circuit Judge.

HEANEY, Circuit Judge.

Roy Antone Nichols appeals his conviction following a jury trial on a single-count indictment charging him with distribution of cocaine, a violation of 21 U.S.C. § 841(a)(1). He received an eight-year sentence, a $10,000 fine, and a three-year special parole term. Nichols argues the district court erred (1) in permitting the government to rebut his testimony with extrinsic evidence of his participation in drug sales in 1981, (2) in permitting the

jury to hear portions of an audio tape of the November 14, 1985, transaction, (3) in refusing to permit his expert to examine original audio tapes recorded during FBI surveillance, and (4) in refusing to permit him to impeach an FBI agent with questions about the agent's traffic offense conviction and with extrinsic evidence concerning his knowledge of an informant's continuing drug-related activity. We affirm.

Background

The indictment charged Nichols with selling four ounces of cocaine to FBI informant Michael Cox on November 14, 1985. Following his own arrest for a drug sale on October 18, 1985, Cox agreed to assist state and federal authorities by arranging a purchase with his supplier, whom he knew only as "Jeff." When shown a photograph of Nichols, Cox identified him as "Jeff." The FBI then installed a tape recorder on the telephone and in the "TV room" of Cox's home.

On October 26, 1985, Cox recorded a meeting he had with Nichols in the TV room during which he paid Nichols $1,800 he owed from previous transactions, discussed a purchase of liquid morphine and valium, and negotiated a sale of cocaine. They agreed Cox would purchase four ounces of cocaine for $1,800 per ounce. On November 13, 1986, Nichols called Cox with instructions to contact him at work the following day to make final arrangements for the sale agreed to on October 26.

On November 14, Cox called Nichols's place of business from the Joplin, Missouri, FBI office and arranged to meet him in a supermarket parking lot in Carthage, Missouri. FBI agents then searched both Cox and his car to ensure he was not carrying drugs and gave Cox a white envelope containing $7,200. In addition, Cox was equipped with a concealed tape recorder and radio

transmitter. Cox then drove alone to Carthage in his own car. Although FBI agents lost sight of Cox's car during the drive from Joplin to Carthage, they continuously monitored him through the radio transmitter to verify that he drove directly to the supermarket parking lot.

At the parking lot, Cox parked so that he was under surveillance by four agents at all times. Nichols arrived about fifteen to twenty minutes later, pulling up along side Cox in his own car. Cox got into Nichols's car and consummated the transaction. Upon exiting Nichols's car, Cox signaled the surveilling agents who arrested Nichols before he exited the parking lot. The agents found the $7,200 in the white envelope on the front seat of Nichols's car. Agents also searched Cox immediately and recovered a brown envelope containing approximately four ounces of cocaine. In addition, agents seized a small notebook from Nichols. Cox's nickname was written at the top of one of the notebook's pages along with his home telephone number and the name "Jeff."

In its case in chief, the government offered testimony from investigating officers, Cox, and Cox's wife, who was present during the October 26 meeting at Cox's home. In addition, the jury heard audio tapes of: (1) a telephone conversation between Cox and Nichols that occurred immediately before the October 26 meeting; (2) the meeting on October 26 between Nichols and Cox in Cox's TV room; (3) two telephone calls Cox made from the Joplin FBI office on November 14 to Nichols's place of business; and (4) the conversation between Nichols and Cox during the drug transaction on November 14 in Nichols's car. Each participant in each conversation, except Nichols, testified he or she had recently listened to the tapes, recognized his or her voice, and verified the tape was a fair and accurate recording of the conversation. Similarly, the agents

monitoring the transmissions from Cox's concealed transmitter verified the accuracy of the tape of the November 14, 1985, sale.

An audio forensic expert who had examined copies of the original tapes testified for Nichols. His examination revealed unexplained occurrences on the tapes that suggested some stopping and starting during recordings. On cross-examination, however, he stated that the recording of the November 14 sale itself was continuous and contained no discontinuities suggesting erasures or rerecording.

In his testimony, Nichols stated that he went to the supermarket parking lot to collect a debt from Cox who had refused to come to Nichols's place of business because one of Nichols's colleagues was racially prejudiced. Nichols denied any of his meetings with Cox were for the purpose of selling drugs or arranging the sale of drugs. Cross-examining Nichols, the government asked him if he had participated in six specific drug transactions with government informant Jerry Mosby in 1981. Nichols denied the drug transactions but admitted knowing of Mosby.

The district court then permitted the government to rebut Nichols's denials with Mosby's testimony about the six 1981 drug transactions with Nichols.

Discussion

Nichols's principal argument on appeal concerns the admission of Jerry Mosby's testimony to rebut his denial of any involvement in the six 1981 cocaine transactions. He contends that Fed. R. Evid. 608(b) explicitly bars such extrinsic evidence and, further, that the testimony was inadmissible under Fed. R. Evid. 404(b). In response, the government cites *United States v. Smith Grading and Paving, Inc.*, 760 F.2d 527 (4th Cir. 1985), for the proposition

that Rule 404(b) permits introduction of testimony otherwise inadmissible under Rule 608(b) and argues that Mosby's testimony was admissible to prove section 841 (a)(1)'s elements of knowledge and intent.

Although evidence of similar drug crimes is frequently admissible to prove a defendant acted knowingly or intentionally, *United States v. Jardan,* 552 F.2d 216, 218 (8th Cir. 1977), under the circumstances, we do not believe Mosby's testimony was relevant to these issues in Nichols's case. The government did not offer this evidence in its case in chief to prove Nichols's knowledge and intent. Rather, it claims Nichols's denial of any drug sales to Cox and his expert witness's attack on the integrity of the audio tapes rendered it necessary for the government to prove these elements in rebuttal.

Nichols' denial of any drug sales to Cox, however, did not imply he sold cocaine unknowingly or unintentionally, that is, by mistake or accident.[1] Unlike the defendant in *United States v. Smith,* 552 F.2d 257, 259-60 (8th Cir. 1977), which the government offers to support the admission of Mosby's testimony, Nichols did not claim he lacked the intent necessary under section 841(a)(1). He denied any drug sale took place, intentional or unintentional.

Furthermore, nothing about Mosby's testimony contradicted Nichols's claim of innocent dealings with Cox because the government neither suggested nor proved any connection between the 1981 transactions with Mosby and the November 14, 1985, transaction with Cox. The absence of any connection between the Cox and Mosby transac-

1. "An act is done 'knowingly' if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason." 1 E. Devitt and C. Blackmar, *Federal Jury Practice and Instructions* § 14.04 (1977).

tions and the almost four-year lapse of time between the two incidents distinguishes the cases the government offers in support of its argument. *See United States v. Koessel,* 706 F.2d 271 (8th Cir. 1983) (prior misconduct involved same buyer of drugs from defendant as charged conduct); *United States v. Evans,* 697 F.2d 240 (8th Cir. 1983) (prior misconduct necessary to explain why co-defendant contacted defendant to get involved in charged conduct); *United States v. Jardan,* 552 F.2d 216 (8th Cir. 1977) (prior misconduct evidence concerned activity occurring in month previous to charged conduct and was admitted in government's case in chief); *United States v. Carlson,* 547 F.2d 1346 (8th Cir. 1976) (prior misconduct evidence relevant to conspiracy charge and concerned transactions within six days of the charged transactions).

Although we believe the government failed to establish the admissibility of Mosby's testimony under Rule 404(b), we must review this issue against the trial record as a whole and ignore errors that are harmless. *United States v. Horvath,* 731 F.2d 557, 560 (8th Cir. 1984) (quoting *United States v. Hastings,* 461 U.S. 499 (1983)). The government's case against Nichols was overwhelming. Both state and federal agents observed the November 14, 1985, transaction between Cox and Nichols and monitored it over the transmitter concealed on Cox's person. Nichols had the purchase money in his possession when he was arrested. Cox had four ounces of cocaine immediately after the transaction although FBI agents had thoroughly searched both Cox and his car immediately before he drove to the supermarket parking lot. In the face of this evidence, we find any error concerning the admission of Mosby's testimony harmless beyond a reasonable doubt. *Cf. Horvath,* 731 F.2d at 562-63 (given weight of other evidence, admission of prior misconduct evidence harmless error).

Nichols also alleges the district court erred in failing to exclude portions of the audio tape of the November 14, 1985, meeting with Cox in which Nichols mentioned a grand jury investigation, a statute of limitations problem, and another person's being "busted" on thirty-five counts with Nichol's consequent ascension to second in command. This discussion, however, occurred after Cox inquired why Nichols had missed a previous meeting they had arranged to complete the transaction they discussed on October 26, 1985, in Cox's TV room. Thus, it was probative to explain the reason Cox and Nichols were meeting and to rebut Nichols's anticipated defense that his meeting with Cox was entirely innocent. This portion of the tape was, therefore, admissible under Rule 404(b). *United States v. Evans,* 697 F.2d at 247-48. Consequently, the district court did not abuse its discretion in refusing to exclude this portion of the tape. *Id.* at 248.

We also find the district court did not abuse its discretion in refusing to require the government to supply Nichols's audio forensic expert, Dr. Bernard Krause, with the original audio tapes. The government offered copies of these tapes to Nichols three and a half months before trial, but, ten days before trial, Nichols announced his expert needed to examine the originals on his own equipment in San Francisco, California. In light of Nichols's belated request, the district court reasonably refused to order production of the originals at such a distance. Moreover, after reviewing the record, we do not believe that limiting Dr. Krause to the copies prejudiced Nichols. Dr. Krause testified at length about his examination of the copies and conceded on cross-examination that he found no erasures or rerecordings on the portion of the November 14, 1985, tape that included the sale to Cox.

Finally, Nichols argues the district court erred in limiting his impeachment of FBI Agent Nolan, the principal investigator in the case against Nichols. Nichols wanted to examine Nolan about a traffic conviction for driving while intoxicated. We agree with the district court's refusal to allow questions about this subject. Such impeachment is proper only if the conviction permits imprisonment greater than one year or involves dishonesty or false statement. Fed. R. Evid. 609. We also find the district court did not abuse its discretion in excluding hearsay testimony from the Chief of Police of Baxter Springs, Kansas that Nichols offered to impeach Nolan's credibility. According to Nichols, this witness would have testified that he had heard that the government's informant, Cox, continued to deal drugs after Nichols's arrest. Of dubious relevance, at best, this proposed testimony was properly excluded under Fed. R. Evid. 403 as a collateral matter.

Accordingly, we affirm Nichols's conviction.

A true copy.

Attest:

CLERK, U. S. COURT of APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1556-WM

United States of America,
Appellee,

vs.

Roy Antone Nichols,
Appellant.

Appeal from the United States District Court for the
Western District of Missouri

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

February 25, 1987

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, United States Court of
Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1556-WM

United States of America,
Appellee,

vs.

Roy Antone Nichols,
Appellant.

Appeal from the United States District Court for the Western District of Missouri

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The motion of appellant to stay the issuance of the mandate pending certiorari proceedings is granted. Issuance of the mandate is stayed until April 6, 1987. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

March 6, 1987

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, United States Court of Appeals, Eighth Circuit